MOTION FILED

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No. 03-1282

In The Supreme Court of the United States

HEALTHPLAN SERVICES, INCORPORATED, individually and as successor in interest to Third Party Claims Management Incorporated, and THIRD PARTY CLAIMS MANAGEMENT, INCORPORATED,

Petitioners,

v.

MARY B. GUNNELLS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL HOME EQUITY MORTGAGE ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Home Equity Mortgage Association ("NHEMA") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of counsel for the petitioner has been obtained and that consent has been lodged with the Clerk. The consent of counsel for the respondent was requested but not obtained.

NHEMA is a national trade association whose members are home mortgage lenders or institutions and companies involved in mortgage lending. NHEMA's members have a strong interest in the proper interpretation and application of rules concerning class action litigation, as these companies are frequent targets of class suits. NHEMA has particularized insights into the practical ways in which the decision below will act to unfairly force settlements of even unmeritorious claims contrary to the purpose of Rule 23(f), F.R.Civ.P. and the holding of this Court in Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

WHERFORE NHEMA respectfully requests that the Court grant leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari.

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Interest of Amicus Curiae

The National Home Equity Mortgage Association ("NHEMA") is a national trade association whose members are home mortgage lenders or institutions and companies involved in mortgage lending. NHEMA's members have a strong interest in the proper interpretation and application of rules concerning class action litigation, as these companies are frequent targets of class suits. NHEMA urges the Court to grant the petition for writ of *certiorari* because the majority opinion below is doctrinally unsound and is in conflict with other circuit authority and contrary to prior controlling decisions of this Court in ways that radically upset settled expectations concerning which cases are susceptible to class treatment.[1]

Argument

1. The Panel Majority Has Misapplied Rule 23(c)(4)(A) in a Way Which Creates an Irreconcilable Conflict With the Fifth Circuit.

The majority's reading of Rule 23(c)(4) as permitting the certification of parts of a claim even though they do not predominate in the case as a whole erects an edifice built wholly on the sands of *dicta*. The dissent notes that the majority's position is based on "some district court opinions, commentaries, and a student note that, citing one another, argue in favor of the majority's interpretation." Pet. App. 87a.

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[1] No counsel for a party authored this brief in whole or part and no person or entity other than the *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation of this brief.

The majority opinion starts with In re A.H. Robins, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), citing the case as precedent. But both cited portions of A.H. Robins come not from any holding in the case, but from the court's extended discussion of the development of Rule 23 treatment of mass torts. The court actually held that the case was properly certified as a settlement class under Rule 23(b)(1)(A). 880 F.2d at 747-48.

Moreover, the first cited passage from A.H. Robins, 880 F.2d at 740, acknowledges that the court can certify separate issues (*i.e.*, Rule 23(c)(4) (A)), but continues with language omitted by the majority: "... and, if such separate issues predominate sufficiently (i.e., *is the central issue*), to certify the entire controversy as in Agent Orange." *Id.* (emphasis added). The other passage, 880 F.2d at 728, deals with subclasses (*i.e.*, Rule 23(c)(4)(B)), reiterating the rule that any subclass must meet the requirements for a class.

Next, the majority cites three cases that it says explicitly endorse its position. Valentine v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996), does subscribe to the majority's view in *dicta*, but the actual holding was to reverse certification because it was not clear that plaintiffs satisfied either typicality or adequacy of representation. *Id.* Simon v. Philip Morris, Inc., 200 F.R.D. 21, 28-31 (E.D. N.Y. 2001), is, in effect, a long treatise on the powers of federal judges to sever issues and trials in complex litigation, and was handed down *before* the motion for class certification in case that was even argued. 200 F.R.D. at 24. Consequently, it did not apply the majority's rule either. In Emig v. American Tobacco Co., Inc., 184 F.R.D. 379, 395 (D. Kan. 1998), plaintiffs advanced the majority's argument and the court rejected it. Thus, until now, the majority's position has not had a practical as opposed to theoretical effect on litigants.

Even among the commentators, only Newberg supports the majority. In 7B Wright and Miller, Federal Practice and Proc., Civil 2d, § 1790, the authors state that even if only one common issue can be identified as appropriate for class treatment, this is enough *as long as the other Rule 23 requirements have been met*. *Id.* (emphasis added). The authors continue:

> When the court finds that the noncommon issues are inextricably entangled with the common issues, *or that the uncommon issues are too unwieldy or predominant to be handled adequately on a class basis*, [the court] may have to dismiss the action or strike the class action allegations.

Id. (emphasis added). Only Newberg unqualifiedly supports the notion that a court can manufacture predominance by segregating issues. *See* 1 H. Newberg and A. Conte, Newberg on Class Actions, § 4.25. Newberg cites Rule 23(c)(4) itself, Valentino, In re A.H. Robins, and Goldwater v. Alston & Bird, 116 F.R.D. 342, 351 (S.D. Ill. 1987), a case which Newberg acknowledges holds that the predominance requirement was satisfied. Thus, it should be concluded that the majority's position is novel, radical, and poorly supported. It does, however, set up a clear doctrinal conflict with the Fifth Circuit. Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996). Because any company doing business in any state in the Fourth Circuit can be exposed to a crushing aggregation of claims giving rise to unfair pressures to settle even poorly grounded claims, your amicus has a substantial interest in urging this Court to review this circuit split now.

2. The Majority Adopted a Criterion for Certification in Violation of Amchem Prods., Inc. v. Windsor

The panel majority relied on the holding of Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 186 (4th Cir. 1993), that encouragement of settlement is a valid purpose for class certification. This holding was based on In re A.H. Robins Co., Inc., 880 F.2d at 740 (4th Cir.), *abrogated by* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). But this part of A.H. Robins was abrogated by the Supreme Court in Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618-22 (1997), as the standard citation signal cited above reflects. Therefore, the panel majority decision rests, at least in part, on a standard for class certification that has been overruled by this Court.

Moreover, in every circuit to have considered the matter, creating settlement pressure is now a factor which weighs in favor of granting interlocutory review of class certification under Rule 23(f). Blair v. Equifax Checking Servs., Inc., 181 F.3d 832, 833-36 (7th Cir. 1999); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 292-95 (1st Cir. 2000); Prado-Steiman v. Bush, 221 F.3d 1266, 1271-77 (11th Cir. 2000); Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 146 (4th Cir. 2001); In re Sumitomo Copper Litig., 263 F.3d 134, 139 (2d Cir. 2001); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001); In re Lorazepam & Clorazepale Antitrust Litig., 289 F.3d 98, 99-100 (D.C. Cir. 2002); In re Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002); Fed.R.Civ.P. 23(f), Advisory Committee Note. The panel majority's treatment of the possibility of settlement as a reason for giving discretion to certify parts of cases to force settlement is discordant with this authority as well as being in direct conflict with Amchem and the Fifth Circuit.

3. The Panel Opinion Grants Virtually Unfettered Discretion to District Courts And Eviscerates Rule 23(f).

With the adoption of Fed.R.Civ.P. 23(f) in 1998, providing for interlocutory appeal of class certification decisions, the federal system adopted a policy that early review of class certification decisions on a discretionary basis could advance the fair, orderly, and inexpensive determination of litigation. *See* Fed.R.Civ.P. 23(f), 2003 Committee Note. By its decision in this case, the majority of the panel has effectively eviscerated that policy.

Under the majority opinion, a district court need only hold that there is some common issue capable of class-wide resolution and state its intention to decertify the class if problems of manageability become overwhelming. At that point the majority opinion defers to the desire of the district court to undertake the experiment even though manageability problems have not been presently and adequately addressed. Because there is unlikely to be another decision in any given case from which Rule 23(f) appeal would lie, this deference deprives defendants of the protection Rule 23(f) was designed to provide.

The proper approach is to require the plaintiff to demonstrate how the case can be tried on a class-wide basis prior to certification. For a proper predominance and superiority analysis, the court must know how the case will be tried. Castano v. American Tobacco Co., 84 F.3d 734, 744-45 (5th Cir. 1996). In Gunnells, the district court did not require plaintiffs to carry their burden to show by a rigorous analysis that all of the requirements of Rule 23(a) and Rule 23(b)(3) were met. It should not be readily assumed that a class certification that by design will result in 1400 minitrials on proximate causation and damages is a

superior mode of procedure or resolves predominantly common issues as those concepts are properly understood.

Conclusion

Amicus National Home Equity Mortgage Association prays that the Court grant the petition for *certiorari* in this case because if the Fourth Circuit regime announced in Gunnells is allowed to stand, the practice of forcing settlements through aggregation of claims discountenanced in Amchem can evade review for years. For if a party loses a Rule 23(f) petition for interlocutory review - as most will under the hyper-deferential standards enunciated in Gunnells - few litigants in the Fourth Circuit or in any other circuit following Gunnells could be expected to display the hardihood to embark on "the thankless task of 'you bet your company' where the superhigh stakes ... make settlement a moral imperative, regardless of the merits of the case." R. Epstein, "Class Actions: Warping the Law", National Law Journal 26, 29 (Mar. 22, 2004). Where settlements are coerced as a matter of course there will be few vehicles for later review through which to resolve the existing circuit split. Because denial of a Rule 23(f) appeal is practically immune from Supreme Court review, the problem is all the more likely to evade review if not addressed now. According to the Advisory Committee Note for subdivision(f), "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Wherever a district court follows Gunnells and interlocutory review is refused, settlement pressures will prevent the matter being tested in a way which reaches this Court. As Prof. Epstein has recently stated: "The overall class action system is in an acute state of distress." *Id.* Allowing Gunnells to stand would only contribute to that distress.

Respectfully submitted,

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